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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP A. YOUNG, MAX GOSSARD, ROBERT L. BROEKER, MARK BOKELMAN, JAMES ROHLF, OLIVER E. MOLDESTAD, LARRY GODEJAHN, EMERY PISTULKA, AND ARTHUR REINSMA,
Petitioners,

VS.

STANDARD OIL (INDIANA) AND AMOCO OIL COMPANY,
Respondents.

PETITIONERS' REPLY BRIEF

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I. RESPONDENTS IGNORE OR MISSTATE CRUCIAL FACTS NECESSARY TO THE DETERMINATION OF THIS CASE

That the Respondents conveniently omit or misstate the following facts from their brief:

1. Respondents have maintained written severance pay plans since 1965. (Petition for Writ of Cert. p. 4, Footnote 2) (hereinafter Pet. Cert.)

2. Respondents have never distributed a summary plan description as to the severance plan or any changes made through the years or even included a statement concerning severance though they periodically published and distributed sophisticated Benefit Booklets. (Exhibit L to Second Amended Class Action Complaint).

3. The Respondents never made the text of their severance plans available for inspection by the F&P employees.

4. Divestment plans for the F&P Division began in 1981. (Pet. Cert. p. 3).

5. The Sale Letter and Q&A Forms of August 1982 did not disclose that there had been a special change in Respondents' severance pay plan for the F&P only and that the change was made in anticipation of a sale of the F&P and the termination of all F&P employees (the most valuable asset of the division) from Amoco. (Pet. Cert. p. 5).

6. Whenever the Petitioners sought more information about severance from Respondents they were rebuffed. (Pet. Cert. p. 6).

7. The Respondents totally ignore the fact that Amoco was actively promoting the sale of their plants to their F&P employees on behalf of Schouler in order that the money could be used to pay the purchase price of the F&P Division to Amoco.

II. RESPONDENTS' BRIEF IN OPPOSITION ATTEMPTS TO NARROWLY FOCUS THIS COURT ON SPECIFIC SECTIONS OF ERISA WHILE IGNORING THE PURPOSES AND POLICIES OF ERISA.

Respondents' Brief In Opposition generally ignores the purposes and policies of ERISA which motivated its creation. ERISA was enacted to protect employee/participants' interests in their employers' various welfare benefit plans through strict disclosure requirements resulting in an informed work force who could then enforce their rights and insure reasonable, accountable and equitable administration of these plans.[1]

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[1] 29 U.S.C. §1001; H.R. Rep. 93-1280, 93rd Cong. 2d Sess. 32 (1974) (conference report), *reprinted in*, 3 *Legislative History of the Employee Retirement Income Security Act of 1974* at 4594, 4745 (hereinafter *Leg. Hist.*); S. Rep. 93-127, 93rd Cong. 2d Sess. 29 (1974)

The purposes and policies of ERISA are the backbone of the decision in *Bruch v. Firestone Tire and Rubber Company*, 828 F.2d 134 (3rd Cir. 1987), *cert. granted*, Dkt. 87-1054.

Counsel for Respondents would have us believe that *Bruch* is an interpretation case, nothing more and nothing less, as concerns the arbitrary and capricious standard of review.[2] Nothing could be further from the truth. *Bruch* goes beyond the "four corner" sterility of fiduciary review by expanding the arbitrary and capricious test to include consideration of whether a fiduciary has acted in good faith in the exercise of his duties. As set forth in *Bruch*, the purposes and policies of ERISA are the heart and soul of this case and should be the standard for judicial review.

III. THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW AS ASSERTED BY THE RESPONDENTS IS TOO NARROW, RESTRICTIVE, EFFECTIVELY EMASCULATES ERISA, AND THERE IS A GREAT CONFLICT BETWEEN THE CIRCUITS ON THE PROPER STANDARD REVIEW OF WELFARE BENEFITS UNDER ERISA.

To begin with, the Respondents fail to note that the employer is also the plan administrator in this case thus eliminating the deference that could be shown its actions and decisions.[3] That given the intent of Congress in the creation of ERISA, good faith behaviour must be an element of the arbitrary and capricious standard of reviewing a fiduciary's actions and decisions. The assumption of good faith behaviour runs through

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[2] Respondents' Brief in Opposition at 11. (hereinafter Resp. Brief).

[3] *Bruch v. Firestone Tire and Rubber Company*, 828 F.2d 134 (3rd Cir. 1987) (cert. granted), Dkt. 87-1054, See Brief of Respondents in *Bruch* (hereinafter *Bruch* Brief) which sets out the conflict between the circuits.

out of all of our common and statutory law regardless of topic. ERISA cannot be a place for the employer/fiduciary to hide the advancement of its whims by asserting good faith is irrelevant. An employer/fiduciary's good faith should always be suspect when its decision will save $6.2 million of its own profits.

The issues raised in this case are even more complex than those raised in *Bruch*. Here we are faced with an employer/fiduciary who: (1), has continually ignored the notice and disclosure requirements of ERISA as to severance from the time the act was passed[4]; (2), secretly amends an existing company wide severance policy after it has taken action which it determined in writing would make severance payable to F&P employees resulting in a $6.2 million windfall profit to the employer/fiduciary at the expense of F&P plan participants; (3), relies on undisclosed and secreted amendment language within a prior undisclosed plan; (4), actively thwarts employees' efforts to obtain additional information concerning their severance plan; and (5), evidences a wanton and willfull disregard of good faith by attempting to coherce the F&P employees to indirectly finance its sale.[5]

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[4] 29 U.S.C. §1102(a)(1); 29 U.S.C. §1021-31; 29 U.S.C. §1133. compliance with ERISA disclosure requirement is the threshold showing of good faith. Here Respondents have failed to even meet the threshold since 1975.

[5] When Petitioners received their first ever written materials on severance (other than the 1970 "Stoker" Letter announcing severance as a "established benefit plan") in August 1982, it consisted of a Question and Answer Form and Letter which the Seventh Circuit Court of Appeals found to be unclear and Petitioners assert are statutorily insufficient and show a lack of good faith. Pet. App. at A29. Such documents failed to name the plan administrator or state that the severance plan to be applied to Petitioners was only for the F&P employees and was a change from the current Amoco Severance Policy. The Amoco Severance Policy's actual terms were so secret that even the Manager of the F&P Division admitted that he had never seen its text until Respondents' counsel showed it to him in preparation for Petitioners' deposition. The claims procedure set forth in the

Respondents assert that the above enumerated behaviour is entirely legitimate and further assert, at page 23 of their Brief, that "ERISA provides only for judicial review of the denial of a benefit claim (whether under an "arbitrary and capricious" or any other standard of review) *given* the terms of the benefit plan," citing 29 U.S.C. §1132(a)(1)(B) (emphasis theirs). However, Respondents failed to note 29 U.S.C. §1132(a)(3)(A) and (B) allows participants to sue "to enjoin *any* act or practice which violates *any* provision of this title or terms of the plan, or (B) to obtain other *appropriate equitable relief* (i) to redress such violations or (ii) to enforce *any provisions of this title* or the terms of the plan." (emphasis added) Section 1132 read as whole provides for a plethora of remedies to be determined by the Court as needed to correct employer transgressions of the law and certainly does not limit the scope of the Court's review of the actions and decisions of a plan fiduciary to the four corners of the plan instrument.[6] ERISA must be interpreted as a whole. Judicial review cannot be limited to single sections of the statute or to rote review of the employer/fiduciary's interpretation of a plan's language when plans are written (and changed) by employers eager to manipulate the employee protection policy and nature of ERISA.

Q&A Form and Letter consisted of "Please contact your immediate supervisor if you have questions regarding the transition. Questions concerning your Amoco Oil benefits should be directed to Lucy Wilcox (312) 789-4934 or Sharon Zorn (312) 789-4966." When Petitioner Young attempted to get a copy of the severance policy by calling Lucy Wilcox as per the instructions, he was rudely refused the documents requested (See Pet. Cert. at 6, Footnote 5). Later, when F&P employees asked oral questions about severance at Amoco company meetings, they were rebuffed. Only after Petitioners from Indiana hired legal counsel who literally guessed on where to send a demand letter for severance was a copy of the Special F&P Severance Policy obtained. Further, it was not obtained in a timely manner and was received after legal proceedings had been commenced in Indiana.

[6] *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985); *See also* (Brennan, J., concurring); *See also* 29 U.S.C. §1024(b)(4); 29 U.S.C. §1133.

After asserting that procedural violations are not substantive, Respondents further assert that the Petitioners were not prejudiced by Respondents' failure to fully disclose the existence, terms and changes made in their severance plan. By common sense, an uninformed employee does not have the ability to police his rights in an unknown plan thus frustrating the basic goal of ERISA as clearly enunciated in 29 U.S.C. §1001.[7] Respondents urge the Court to accept the premise that an employer can promise an employee anything, actively conceal its ability to renege on the promise, and thus manipulate the situation to avoid that promise. It is unfathomable that this was the intent of Congress and Courts have concurred.[8] If Respondents' arguments are followed to their logical conclusion, ERISA actually diminishes employee rights as to their welfare benefits. Further, they are requesting the Court to throw out the statutory requirements placed by Congress in ERISA, ignore all common law and condone self dealing.

Before closing this argument, Petitioners need to assert that the foregoing does not mean that welfare benefit plans can never be amended, but when amended, or even terminated, employers must do so in good faith and pursuant to all ERISA notice and disclosure requirements. Respondents rely on language contained in their 1981 (and prior) Severance Plans retaining the right to amend. Respondents refuse to recognize

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[7] H. Rep. No. 533, 2 *Leg. Hist.* at 2358; Sen. Rep. No. 93-127, *supra* at 27, 1 *Leg. Hist.* at 613; 120 Cong. Rec. 4284 (1974), *reprinted in* 2 *Leg. Hist.* at 3386-87; 120 Cong. Rec. 29, 195 (1974), *reprinted in* 3 *Leg. Hist.* at 4665; 120 Cong. Rec. 4287 (1974), *reprinted in* 2 *Leg. Hist.* at 3395; 120 Cong. Rec. 4278 (1974), *reprinted in* 2 *Leg. Hist.* at 3360.

[8] *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied,* 474 U.S. 865 (1985); *Deak v. Masters, Mates and Pilots Pension Plan,* 821 F.2d 572 (11th Cir. 1987) *cert. denied,* 108 Sup. Ct. 698 (1988); *Bruch, supra; Jordan v. Central Louisiana Telephone Company, et al.*, 525 So.2d 1079, (La.App. 3 Cir. 1988).

that they totally failed to disclose the entire text of the plans or summarize in a SPD resulting in the total ignorance of the Petitioners. This result is what ERISA specifically contemplates avoiding through its mandatory disclosure and notice requirements.[9] Further, Courts cannot review an employer/fiduciary's decision in a total void. To insure good faith, the surrounding circumstances must be reviewed. *See* cases cited in Footnote 8. Lower Courts in other cases found changes to welfare benefit plans valid, it was due to some redeeming value or show of good faith (i.e. full plan disclosure, employee knowledge of the employer's right to amend, union negotiation for employees, or similar plan maintained by acquiring company); none of which is present in this case.[10]

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[9] Respondents cite three totally inapplicable cases to support their reliance on plan language retaining the right to amend. *Cattlin v. General Motors Corp.*, 641 F.Supp. 591 (E.D. Mich. 1986) where plaintiffs had written documentation that GM reserved the right to amend their 30 and out program; *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) which is not about retaining the right to amend; *In re White Farm Equip. Co.*, 788 F.2d 1186 (6th Cir. 1986) where in summary booklets distributed to employees the company reserved the power to terminate plans. Space limitations prevent Petitioners from pointing out all the numerous incidents in Respondents' Brief in Opposition where cases cited appear inapplicable to the point being made.

[10] Counsel for Amoco cites the following cases to support their position but fails to point out that either the notice requirements of ERISA were met, the employer made additional good faith efforts, or the employees were represented by a union assuring knowledge of benefits. *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) where a union negotiated to have the new company continue the severance policy; *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574 (3rd Cir. 1985) moot case as ERISA has been amended to prevent this problem; *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986) where the company was in process of amending all retirement plans not in anticipation of a specific event; *United Ind. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 262 (7th Cir. 1985) again a union negotiated amendments to benefits. (*See* also *Bruch* Brief, Footnote 15).

In no other case cited by either party has there been such a total disregard for the statutory requirements (disclosure) of ERISA, total lack of good faith and the presence of a such wanton disregard of the rights of the employees by an employer as in the instant case.[11]

IV. PETITIONERS HAVE COMPLIED WITH JURISDICTIONAL REQUIREMENTS FOR FILING

The Petition for Writ of Certiorari in this cause meets the ninety (90) day jurisdictional limitation as said Petition was placed in the United States Mail on September 21, 1988, which was the due date. Counsel for Petitioners, after consultation with the Supreme Court's Clerk's office sent their original Affidavit of Mailing. As Supreme Court Rule 28.2 does not set forth a time period for the Affidavit of Mailing to be sent, counsel for Petitioners, as a show of good faith, have submitted a second Affidavit of Mailing mailed after the Petition for Writ of Certiorari was timely filed stating said Petition was timely mailed as the rule requires.

CONCLUSION

This Court cannot ignore the statutory requirements and the purposes and policies set forth in ERISA as Respondents so advocate. To narrow or restrict the judicial review of the actions

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[11] Space limitations on appeal prevent Petitioners from listing in detail all transgressions from statutory requirements and of good faith by Respondents but almost every area that has troubled the district and circuit courts in their decisions concerning severance welfare benefits is covered in this case including, but not limited to: a policy whose text (including the right to amend) is secreted, failure to prepare and distribute SPD's, past practices of payment of severance, payment of benefit from general funds of employer, refusal to provide benefit documents upon request, self dealing and coercian in a sale situation, lack of union representation, lack of job security with new employer, the fact that Cropmate (Purchaser) had no severance policy and Respondents retained no liability for severance, etc.

and decisions of an employer/fiduciary as espoused by Respondents is clearly contrary to the equitable nature of the statute as a whole and specifically 29 U.S.C. 1132(a)(3)(A) and (B). The Court has before it in this case practically every transgression of ERISA yet concocted by Corporate America designed to circumvent ERISA and prevent the Petitioners from their rightful enjoyment of their severance pay.

This Court must clear the confusion in the Circuits by creating a uniform standard for reviewing the performance of an employer/fiduciary in carrying out all of its duties as contemplated by ERISA. The arbitrary and capricious review advocated by the Respondents is too narrow and restrictive as it has been historically developed from the Labor Management Relations Act. Given the stated goals of ERISA, the arbitrary and capricious standard of review must be broadened to include good faith and contemplate the totality of actions of an employer. The Court should not allow large companies to technically manipulate a statute designed to assist and protect the employee and blatantly ignore all notice, disclosure and other good faith requirements placed in ERISA by Congress without penalty.

For the reasons discussed in the Petition and in this Reply Brief, the Court should grant the Petition for Writ of Certiorari to reconcile the intercircuit conflicts on all of the issues presented by this case.

Respectfully submitted,

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